

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-cv-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

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**STATE OF OKLAHOMA'S REPLY TO "DEFENDANT COBB-VANTRESS, INC.'S  
OPPOSITION TO PLAINTIFF'S' [sic] MOTION FOR PARTIAL SUMMARY  
JUDGMENT WITH REGARD TO PLAINTIFFS' [sic] STATE LAW AND FEDERAL  
COMMON LAW CLAIMS" (DKT # 2185)**

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The State of Oklahoma ("the State") respectfully submits the following as its Reply to "Defendants Cobb-Vantress, Inc.'s Opposition to Plaintiffs' [sic] Motion for Partial Summary Judgment with Regard to Plaintiffs' [sic] State Law and Federal Common Law Claims" [DKT #2185].<sup>1</sup>

## **I. Introductory statement**

Particularly pertinent to this Reply are the undisputed facts set forth in paragraphs 47 and 48 of the State's Motion for Partial Summary Judgment. Paragraph 47 establishes that "Defendants have long been aware that the land application of poultry waste in the IRW presented a serious risk of potential environmental impact due to phosphorus run-off and leaching," and paragraph 48 establishes that "the phosphorus contained in the poultry waste generated by Defendants' birds that has been land applied in the IRW can, and does, run-off and leach into the waters of the State." *See* DKT #2062, ¶¶ 47-48. Significantly, Defendants fail to raise a genuine issue of material fact as to either of these facts. *Compare* State's Motion, DKT #2062, ¶¶ 47-48 with Tyson response, DKT #2199-2, ¶¶ 47-48. Defendants' response to ¶ 47 literally cites *no* evidence, but rather incorporates Defendants' response to ¶ 48. The State's ¶ 48 provides an eight page summary of evidence supporting the fact that phosphorus contained in the poultry waste generated by Defendants' birds that has been land applied in the IRW can, and does, run-off and leach into the waters of the State. In contrast, Defendants' response to ¶ 48 neither contradicts the State's evidence of corporate knowledge of the environmental risk (raised in ¶ 47), nor presents evidence that phosphorus from the poultry waste generated by Defendants' birds does *not* get into the waters of the State. Consequently, Defendants have confessed two key facts in this case.

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<sup>1</sup> The State incorporates herein its Reply to "Tyson Foods, Inc.'s Opposition to Plaintiffs' [sic] Motion for Partial Summary Judgment -- Statement of Undisputed Facts."

## II. Argument

### A. Defendants are liable under Restatement § 427B and similar case law

#### 1. Restatement § 427B-type liability is recognized under Oklahoma law

Oklahoma law<sup>2</sup> clearly has long recognized Restatement § 427B-type liability.

Defendants' assertion that *Tankersley v. Webster*, 243 P. 745 (Okla. 1925), "strongly suggests that Section 427B is not compatible with Oklahoma law," *see* Opp., p. 4, is flatly inaccurate.

*Tankersley* recognized as good law in Oklahoma the principle that "where the performance of [a] contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which caused the injury, then the employer is subject to the same liability as the contractor." 243 P. at 747. The *Tankersley* court simply concluded that that principle was not applicable to the facts of the case before it. But Restatement § 427B-type liability is plainly the law in Oklahoma.<sup>3</sup>

Further, Defendants do not claim Chief Judge Eagan was wrong on the merits in the *City of Tulsa* case when she applied Restatement § 427B to their conduct in the adjoining watershed

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<sup>2</sup> Defendants persist in advancing their erroneous assertion (previously rejected by this Court) that Arkansas law applies to nuisance-causing conduct in Arkansas that results in injury in Oklahoma. *See* Opp., p. 2, fn 2. As indicated in footnote 1 of the State's Motion, Oklahoma law applies to such conduct as a matter of choice of law principles.

<sup>3</sup> Defendants attempt to make hay of the fact that the State cannot point to an Oklahoma state court decision explicitly stating that Restatement § 427B is the law of Oklahoma. Of course, in light of *Tankersley* -- which is essentially the same as Restatement § 427B -- there is no need for an Oklahoma court to make such a pronouncement. In any event, Oklahoma courts routinely look to the Restatement (Second) of Torts for guidance and apply its principles. *See, e.g., Tansy v. Dacommed Corp.*, 890 P.2d 881, 883-84 (Okla. 1994) (applying Restatement (Second) of Torts § 402A regarding product liability); *Wright v. Grove Sun Newspaper Co.*, 873 P.3d 983, 989 (Okla. 1994) (applying Restatement (Second) of Torts § 611 regarding common-law fair report privilege); *Schovanec v. Archdiocese of Oklahoma City*, 188 P.3d 158, 169-71 (2008) (applying Restatement (First) of Agency § 213 and Restatement §§ 12 & 317 regarding employers' reason to know of employee likely to harm others); *Miller v. Miller*, 956 P.2d 887, 899 (Okla. 1998) (applying Restatement (Second) of Torts § 46 regarding intentional infliction of emotional distress).

six years ago. *See City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1296-97 (N.D. Okla. 2003), *vacated in connection with settlement*. Doubtless the correctness of her decision was part of the reason Defendants sought to have her order vacated in connection with their settlement.

Defendants recognize vicarious liability of an employer for negligent hiring of a contractor, for negligent performance of actions by the employer, or for delegating to an independent contractor work which is inherently dangerous. *See Opp.*, p. 6. However, Defendants offer *no* principled reason why an employer who knows performance of the contracted job in the ordinary course is likely to cause a trespass or nuisance is not likewise liable for resulting harm. Outsourcing work to a contractor knowing that the work creates waste that will cause a trespass or nuisance makes the employer no less liable than one who outsources inherently dangerous work. Simply put, the liability of one who employs a contractor and who knows or has reason to know the contractor's work is likely to involve a trespass or the creation of a nuisance is established Oklahoma law, and Defendants' assertions that it is not are wrong.

## **2. The scope of Restatement § 427B-type liability reaches Defendants**

Defendants attempt to avoid the reach of Restatement § 427B-type liability by arguing that their contracts with their growers are solely to raise poultry, and that "the raising of poultry[] does not necessarily, or even likely, result in a trespass or nuisance." *See Opp.*, p. 7. This argument that the generation of the enormous quantities of poultry waste by their birds in the IRW -- some 345,000 tons annually -- is somehow divorced from the raising of hundreds of millions of birds in the IRW is fallacious. Moreover, the argument that a trespass or nuisance necessarily *must* result is based upon a misunderstanding of Restatement § 427B-type liability.

Taking the latter argument first, as explained in Comment b to Restatement § 427B:

It is not, however, necessary to the application of the rule that the trespass or nuisance be directed or authorized, or that it shall necessarily follow from the

work. *It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result.*

(Emphasis added.) Thus, under Restatement § 427B-type liability the trespass or nuisance does not have to be directed or authorized in the contract; rather Defendants simply have to have "reason to recognize" a trespass or nuisance *is likely to result*. As addressed below, *see* section A.3, the evidence on this point is both overwhelming and not effectively disputed.

As to the former argument -- that their contracts with their growers are solely to raise poultry -- it, too, can be quickly dispatched. As Chief Judge Eagan wrote when dismissing this very same argument in *City of Tulsa*, "[p]oultry waste 'necessarily follows' from the 'growing' of poultry. *See Bleeda*, 205 N.W.2d at 89." 258 F.Supp.2d at 1296. This fact has not changed one iota in the intervening six years. The generation of massive amounts of poultry waste is still the natural result of raising hundreds of millions of birds in the IRW annually. To assert that the generation of this waste, which must be managed, is not an inherent part of the contracts between Defendants and their growers defies logic.<sup>4</sup> *See McQuilken v. A&R Development Corp.*, 576 F.Supp. 1023, 1033 (E.D. Pa. 1983) ("An employer or contractor is held liable for "farming out" work which he knows, or has reason to know, will create a nuisance"). Indeed, as things presently stand, it is well-known by Defendants that it necessarily follows that this poultry waste will be "managed" by applying it to the land in the IRW.<sup>5</sup> *See* DKT #2062, ¶ 28.

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<sup>4</sup> Defendants admit they provide the birds and the feed that passes through them. *See Opp.*, p. 7. It is entirely disingenuous for them to know about the birds and the feed, and then claim that they do not know that waste is produced and disposed of on the land, that water flows downhill and that their wastes will not stay where they are dumped. *See, e.g., Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1113 (D. Idaho 2003).

<sup>5</sup> Defendants assert that "the objected-to conduct (*i.e.*, the decision on how, when, and where to use poultry litter) is performed solely by individual farmers and ranchers." *See Opp.*, p. 7. This assertion is false. *See* DKT # 2125, ¶ 19.

Defendants next attempt to avoid their Restatement § 427B-type liability by arguing their contract growers are managing the waste in compliance with animal waste management plans ("AWMP"). In making this argument, not only do Defendants again try to suggest that an AWMP is a permit or authorization to make a specific application of poultry waste on a specific parcel of land -- which is demonstratively not true, *see* DKT #2062, ¶ 29; DKT #2131, pp.15-21, but also Defendants suggest that they can somehow immunize themselves by virtue of their contract growers having such AWMPs. This argument ignores the fact that an employer with notice of an activity that is likely to cause a trespass or nuisance is itself required to halt or suppress the activity. *See, e.g., Peairs v. Florida Publishing Co.*, 132 So.2d 561, 565 (Fla. 1st DCA 1961) ("[w]here a company gains knowledge of a dangerous situation created by its independent contractor, it may incur liability through its failure to halt the operation or correct it . . .") (quotations omitted); *Shannon v. Missouri Valley Limestone Co.*, 122 N.W.2d 278, 281 (Iowa 1963) (it is the duty of the employer, upon receiving notice, "to take reasonably prompt and efficient means to suppress the nuisance"). In short, Defendants try to defend the case they *wish* the State had brought, because they cannot defend the actual case against them. To prevail in this case, the State need not prove that specific growers shirked their obligations under law, *see* Opp., p. 9; rather the State merely needs to prove, as it has done, that Defendants employ contract growers under circumstances likely to lead to a trespass or nuisance.

### **3. Defendants have raised no genuine question of material fact with respect to their Restatement § 427B-type liability**

Defendants try to avoid liability by claiming the questions surrounding the 427B issue are fact-bound, *see* Opp., p. 10, and then asserting that they have successfully disputed the State's statement of undisputed facts. However, despite sprinkling their Opposition with references to paragraphs of their response to the Statement of Undisputed Facts, a close look behind those

paragraph citations reveals Defendants do not have the evidence to create a genuine fact question.

Defendants claim that the State must show two elements to prevail on imposition of Restatement § 427B-type liability: first, Defendants had knowledge that a trespass or nuisance is likely to result from the contracted-for work and, second, resulting "harm."<sup>6</sup> *See Opp.*, p. 10. Defendants create no genuine fact issue as to either element.

On the knowledge element, Defendants rely first on their response to the State's ¶ 28, *see Opp.*, p. 12, which, based on firm evidence, stated that Defendants are aware that it has been the practice to apply poultry waste generated by their birds in the IRW to the land in the IRW. Defendants' only *factual* response to the State's ¶ 28 is that not all of the poultry waste generated in the IRW is applied in the IRW. *See DKT #2199-2*, pp. 13-14, ¶ 28.<sup>7</sup> Defendants also rely on their response to the State's ¶ 47. *See Opp.*, p. 12. In that paragraph the State established the Defendants have long been aware that the land application of their waste in the IRW presented a serious risk of potential environmental impact due to phosphorus run-off and leaching. The Defendants respond with *no* facts whatsoever to the State's ¶ 47, but rather incorporated their response to the State's ¶ 48.<sup>8</sup> The State's ¶ 48 is supported by eight pages of record evidence references supporting the fact that phosphorus contained in waste generated by Defendants' birds that has been land applied in the IRW runs off and leaches into the waters of the State.

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<sup>6</sup> Defendants are wrong on the "harm" standard. For injunctive relief under state law nuisance, the federal common law of nuisance, and 27A Okla. Stat. § 2-6-105(A), all the State must show is the likelihood of nuisance by pollution of the State's waters.

<sup>7</sup> Tyson admits it learned poultry waste was on the ground "at some unidentifiable point in time," in part because states regulated it.

<sup>8</sup> Defendants also sprinkle their brief with references to their response to the State's ¶¶ 3-8, 29, 36, 39, 41, and DKT # 2033, Exs. 10-17, *see Opp.*, pp. 13-14. In its ¶ 39 the State establishes Defendants' admission that there has been over application of poultry litter on many farms. None of these paragraphs and exhibits contradicts the *fact* of their knowledge of the risk of land application, and, at best constitutes argument.

Defendants' response to the State's ¶ 48 cites some of their own expert reports, but does *not* contradict the *fact* that phosphorus from Defendants' poultry waste gets into the water.

Defendants have not, and cannot, dispute the crucial facts of the State's ¶ 48.

Defendants are no more successful with their purported factual challenge to the likelihood of nuisance element necessary for imposition of Restatement § 427B-type liability. Significantly, under Section 427B the State only need prove that a trespass or nuisance is "likely." It has done so, and Defendants' effort to raise a factual question about that proof, *see* Defendants' Response to States' ¶¶ 42-52, is hollow. *See* Opp., p. 15. In these paragraphs Defendants admit that phosphorus is contributed to stream water during high-flow events from non-point sources (¶¶ 42 & 49). However, closely reading the content of Defendants' response to the State's ¶¶ 42-52 shows they do not contradict the State's evidence that a trespass or nuisance is "likely" from their waste disposal practices. Consequently, summary judgment in favor of the State for imposition of Restatement § 427B-type liability is appropriate.<sup>9</sup>

**B. The State is entitled to injunctive relief, the terms of which will be determined at trial**

The State has correctly stated the legal standard for injunctive relief under its federal common law of nuisance theory (SAC, Count 5) as activity by a defendant that "is causing an injury or significant threat of injury to some cognizable interest of the complainant." *See State of Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238-39 (1907)) (vacated by Supreme Court on CWA preemption grounds). Likewise, the State correctly stated the legal standard for injunctive relief under its

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<sup>9</sup> Defendants raise a host of ancillary issues as purported issues of fact. *See* Opp., pp. 13-15. These ancillary issues have been exhaustively addressed in other briefing presently before the Court, *see, e.g.*, DKT #2131, pp. 15-21 (poultry waste being applied pursuant to purported state permits); DKT #2119, pp. 20-23 (no nuisance where there is purported legislative authorization), and the State respectfully directs the Court to those responses.

state common law of nuisance claim (SAC Count 4) as "a reasonable degree of probability" that a defendants' conduct will cause injury to another's interests if not enjoined.<sup>10</sup> *See Sharp v. 251st Street Landfill*, 925 P.2d 546, 548-49 (Okla. 1996); *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1022-23 (10th Cir. 2007). A comparison of the language of these legal standards against the RCRA endangerment standard, *see* DKT #2062, pp. 38 & 47-51, reveals that they are akin to one another. Because the State has satisfied the RCRA endangerment standard, *see* DKT #2062 & DKT #2253, the State has also satisfied the state law nuisance and federal common law nuisance standards for injunctive relief. Consequently, the State is entitled to injunctive relief against Defendants. The exact nature of that relief remains for trial.

Defendants persist in hiding behind their contract growers, arguing that an injunction would be futile. *See* Opp., p. 17. This is not true. In the *City of Tulsa* case the Court issued a consent decree under which the Defendants assumed responsibility for disposal of their waste under terms agreed to by the parties and ordered by the Court. *See* DKT #2062, ¶ 17; DKT #2070-10 (Tolbert P.I. Test., pp. 94-95); DKT #2070-11 (*City of Tulsa* Order, pp. 2-3 and Consent Decree, pp. 8-9). The Court need not be concerned about whether or not contract growers would agree "voluntarily to comply" with its order, as suggested by the Defendants. *See* Opp., p. 18. In the *City of Tulsa* consent decree the Defendants agreed, and the Court ordered, that Defendants (1) not engage in or knowingly permit land application under prohibited circumstances; and (2) not place additional birds with any grower determined to have engaged in land application or transfer of waste under circumstances prohibited in the order. *See* DKT

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<sup>10</sup> Defendants make yet another attempt to miscast the State's case by claiming their own *lack* of invocation of 50 Okla. Stat. § 1.1 amounts to a concession by the State that it must demonstrate site-specific causation linking particular farms to alleged harms. *See* Opp., pp. 16-17, fn. 10. This is neither the law (which allows proof of the State's claims by circumstantial evidence), nor any "concession" by the State. *See* DKT #2062, pp. 62-64.

#2062, ¶ 17; DKT # 2070-11 . A similar prohibition on placing additional birds with growers who do not agree to terms required by the Court in the present case will ensure the Defendants' nuisance is abated (and their trespass halted).<sup>11</sup>

**C. The State is entitled to injunctive relief under its 27A Okla. Stat. § 2-6-105 claim**

The State is entitled to summary judgment for injunctive relief under its claim based on 27A Okla. Stat. § 2-6-105 (SAC Count 7) for conduct within the Oklahoma portion of the IRW. This statute prohibits, and declares it to be a public nuisance, to "cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." For reasons discussed above, Defendants fail to effectively dispute the fact that, at a minimum, they cause waste to be placed where it is *likely to cause pollution* of the waters of the state (which is the basis for the State's Motion for Partial Summary Judgment). In the hilly, karst terrain of the IRW, Defendants' birds create some 345,000 tons of waste annually, under circumstances where it is placed on land where some of its constituents will be transported to surface water or groundwater.

Injunctive relief is not futile under this claim for the same reason it is not futile under the State's other claims. As was done in *City of Tulsa*, the Court can enter an order requiring

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<sup>11</sup> The State is not asking for any injunctive relief against growers, or anyone else, who are not before the Court. Because of both the flock-to-flock nature of the contracts between the Defendants and their growers and because of the Court's own considerable equitable powers, the Court can impose upon the Defendants themselves both the expense and performance of all appropriate requirements for ensuring that their poultry waste is disposed of in a fashion necessary to abate the nuisance and end any likelihood of pollution of the waters of the State. As was the case in *City of Tulsa*, the Court can achieve adequate injunctive relief by prohibiting Defendants from placing birds with any grower who does not agree that waste created will be disposed of under such terms as the Court ultimately finds appropriate, or who does not keep that agreement. In consequence, the terms of any "general marketplace" for poultry waste, and the availability of that waste to non-parties, would be governed by the terms of the Court's injunction.

Defendants to see to it that their waste is not put in locations where it is likely to cause pollution of the waters of the State. It can back that order up, as it did in the *City of Tulsa* case, with a prohibition on placing birds with any grower that will not cooperate.

With respect to the State's section 2-6-105 claim, Defendants again resort to falsely asserting that the land application of poultry waste in Oklahoma is permitted or authorized, and therefore Defendants cannot be liable. As the State's witnesses have explained and as is clear from the Oklahoma Registered Poultry Feeding Operations Act ("ORPFO Act") itself, the State *does not* permit or authorize any particular land application of poultry waste on any particular field. Moreover, in any event, one of the "specific instructions" set forth in the ORPFO Act is that there is to be no run-off of poultry waste. The undisputed evidence is, however, that in the IRW there will *always* be run-off of Defendants' land-applied poultry waste to the waters of the State. See DKT #2062, ¶ 48. Thus, every land application of poultry waste in the IRW is a placement which is likely to pollute the State's waters and a violation of section 2-6-105.

Finally, section 2-6-105 is not void for vagueness. A prohibition on placing waste where it is likely to pollute the water is perfectly understandable, and is essentially the same standard Congress used in RCRA and is found in the common law of nuisance. The problem is not that the Defendants cannot know what the law prohibits, but that they do not want the expense of obeying it and cleaning up after their birds.

Summary judgment is appropriate on Count 7.

### **III. Conclusion**

This Court should grant the State's Motion for Partial Summary Judgment.

Respectfully Submitted,

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